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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS/CROSS-RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 551 *et seq.*, waives the sovereign immunity of the United States so as to allow an action in district court that seeks to "enjoin" the federal government to pay several million dollars to a state under a federal grant-in-aid program, or whether such an action must instead (in the absence of any specific waiver of sovereign immunity) be pursued in the United States Claims Court under the Tucker Act, 28 U.S.C. 1491.

2. If the APA does not waive the sovereign immunity of the United States for such a monetary action in district court, whether the district court may nevertheless split the case into two actions, with the district court retaining jurisdiction over claims for "prospective" relief that accompany, and are based on precisely the same legal theories as, the monetary claim that must be brought in the Claims Court.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, certain other officials of the Department of Health and Human Services were named as defendants in the district court and are petitioners/cross-respondents here: William L. Roper, M.D., Administrator of the Health Care Financing Administration; and Norval D. Settle, Judith A. Ballard, and Donald F. Garrett, members of the Departmental Grant Appeals Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 816 F.2d 796. One opinion of the district court (Pet. App. 17a-31a) is reported at 616 F. Supp. 687. The other opinion of the district court (Pet. App. 33a-35a) is reported at 622 F. Supp. 266. The orders of the district court respecting jurisdiction (Pet. App. 37a-38a) are unreported. Decisions No. 638 and No. 438 of the Departmental Grant Appeals Board of the Department of Health and Human Services (Pet. App. 39a-52a, 53a-84a) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-712.

JURISDICTION

The judgments of the court of appeals (Pet. App. 85a, 86a) were entered on March 31, 1987. A petition for rehearing was denied on June 2, 1987 (Pet. App. 87a-88a). On August 19, 1987, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 30, 1987. On September 22, 1987, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including October 30, 1987, and the petition was filed on that date. The Commonwealth's cross-petition for a writ of certiorari was filed on December 2, 1987. The petition and the cross-petition were granted on January 11, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. IV) 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants

> consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.
> * * *.

28 U.S.C. 1346(a) provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *.

28 U.S.C. 1491(a) provides in pertinent part:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand

appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.* * *.

* * * * *

STATEMENT

This action arises out of a dispute between petitioners and respondent over whether certain expenditures incurred by respondent in providing services at intermediate care facilities for the mentally retarded were properly reimbursable under the Medicaid program.[2] Respondent filed suit in the United States District Court for the District of Massachusetts, asking that court to "[e]njoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth" for the disputed expenditures (Pet. App. 93a, 98a). The court of appeals found that this action presented both a "retrospective" claim for money damages against the United States, and a "prospective" claim for declaratory and injunctive relief (*id.* at 4a). The court concluded that under the Tucker Act, 28 U.S.C. 1491, the United States Claims Court had exclusive jurisdiction over the retrospective part of the suit. The court held, however, that the district court also had jurisdiction insofar as the complaint sought prospective relief. Accordingly, the court reached the merits of the legal dispute between the parties, which it resolved in favor of respondent.

1. During the period 1978-1982, respondent received several hundred million dollars from the federal government in partial reimbursement for its costs in providing services at intermediate care facilities for the mentally retarded (ICFs/MR). ICFs/MR are generally eligible for reimbursement under Section 1905(a)(15) and (d) of the Medicaid statute, 42 U.S.C. (& Supp. III) 1396d(a)(15) and (d).[3] The obligation of petitioner Secretary

[2] In this brief we use "petitioners" to refer to petitioners/cross-respondents (*i.e.*, the federal parties) and "respondent" to refer to respondent/cross-petitioner the Commonwealth of Massachusetts.

[3] The Medicaid statute is Title XIX of the Social Security Act, 42 U.S.C. (& Supp. III) 1396-1396q. See *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 528-529 (1985).

of Health and Human Services (the Secretary) to reimburse states with approved Medicaid plans (such as respondent) for eligible expenditures is stated affirmatively in Section 1903(a) of the statute. See 42 U.S.C. 1396b(a) (emphasis added) ("the Secretary (except as otherwise provided in this section) *shall pay* to each State which has a plan approved under this subchapter" amounts specified by a detailed statutory formula).

The statute, however, limits reimbursable services at ICFs/MR in several important ways, as described in our petition (at 4-6). To implement the statutory limitations, the Secretary has adopted a regulation providing that payments to ICFs/MR "may not include reimbursement for vocational training and educational activities" (42 C.F.R. 441.13(b)).

On two separate audits, which covered the years 1978-1982, auditors from the U.S. Department of Health and Human Services (HHS) determined that respondent had included among the costs for which it had obtained Medicaid reimbursement various "special education" services provided to residents at ICFs/MR by the Massachusetts Department of Education (MDOE). Because the auditors viewed the services in question as unreimbursable under the Medicaid statute and regulations, HHS disallowed $6,414,964 in federal financial participation for the period from July 1, 1978, to December 31, 1980, and $4,908,994 for the period January 1, 1981, to June 30, 1982 (see Pet. App. 17a, 34a). Respondent appealed to the Departmental Grant Appeals Board (GAB) of HHS, which upheld both disallowances (*id.* at 39a-52a, 53a-84a). The disallowed amounts have since been recouped by HHS by withholding a portion of certain advance reimbursements given to respondent for Medicaid expenses in years subsequent to the audit years.

2. In response to the GAB decisions, respondent filed two complaints in federal district court. Each complaint sought "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified monetary amount] in federal financial participation due to the Commonwealth of Massachusetts" (Pet. App. 89a-90a, 95-96a). Under the heading "Requests for Relief," each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse

the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a, 98a).

Petitioners raised the defense of lack of subject-matter jurisdiction in their answer and were directed by the district court to brief that issue (see Pet. App. 37a). In a responsive memorandum filed on December 29, 1983, petitioners stated that, "[a]s a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action" (J.A. 20). Nevertheless, petitioners went on to observe that "[t]his action raises two significant questions of subject matter jurisdiction" (J.A. 22). One of those questions was "does this Court or the Claims Court have jurisdiction over plaintiff's claims, which can be construed as monetary claims over $10,000?" (*ibid.*).[4]

The district court did not address the substance of the jurisdictional issues to which petitioners had alerted the court.

[4] The other question raised in our memorandum was whether Medicaid disallowance determinations are judicially reviewable at all. A specific provision of the Social Security Act (42 U.S.C. (Supp. III) 1316(d)) permits the Secretary to disallow particular items for which a state claims reimbursement under Title XIX (Medicaid) of the Act, but no provision of the Social Security Act provides for judicial review of the Secretary's disallowance determinations. The absence of any specific judicial review provision, expecially when contrasted with the judicial review provision that *does* exist within the same section (42 U.S.C. (Supp. III) 1316(a)(3)), might be read to preclude judicial review, and there is legislative history to support the view that no judicial review of disallowance determinations was intended. See generally *State Dep't of Pub. Welfare* v. *Califano*, 556 F.2d 326, 329 n.4, 332 (5th Cir. 1977), cert. denied, 439 U.S. 818 (1978). Nevertheless, the explicit requirement of 42 U.S.C. 1396b(a) that the Secretary "shall pay" the states amounts that are determined in accordance with the statute constitutes, we believe, a "federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Accordingly, it is petitioners' position that a state may contest a disallowance by seeking compensation under the Tucker Act, and that disallowance decisions are to that extent judicially reviewable. As we make clear in the remainder of this brief, however, it is also our position that *only* the Tucker Act – and not the Administrative Procedure Act – authorizes judicial review of disallowance decisions.

Rather, on January 11, 1984, the district court held in an unelaborated, handwritten order that it had jurisdiction (Pet. App. 38a). Subsequently, on August 27, 1985, the court issued an opinion granting summary judgment to respondent and overturning the GAB's first disallowance determination in its entirety (*id.* at 17a-31a). The court entered judgment on October 7, 1985, in which it "ordered and adjudged that the decision of the [GAB] which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed" (*id.* at 32a). Because respondent's second complaint raised the same legal issues as the first complaint, the district court likewise entered a memorandum and order and corresponding judgment holding for respondent on that complaint on November 25, 1985, and December 2, 1985 (*id.* at 33a-36a).

3. Petitioners appealed to the United States Court of Appeals for the First Circuit and argued, among other things, that the district court had impermissibly entered a money judgment that only the United States Claims Court, under the Tucker Act, had the power to render. The court of appeals agreed with petitioners that respondent's lawsuits sought money judgments against the United States and that, to this extent, they had been improperly brought in district court. In so holding, the court of appeals reiterated, in abbreviated form, the reasoning of its decision one day earlier in *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987). The court recognized that no suit against the United States for any form of relief may be maintained in the absence of a waiver of sovereign immunity. The court further acknowledged that Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, permits only "action[s] * * * seeking relief other than money damages." Accordingly, the court held: "The district

disallowance decisions are to that extent judicially reviewable. As we make clear in the remainder of this brief, however, it is our position that *only* the Tucker Act – and not the Administrative Procedure Act – authorizes judicial review of disallowance decisions.

court may not * * * consider the claim for money past due. That claim is one for 'money damages' * * *." Pet. App. 5a. Insofar as a plaintiff sought to recover past-due money from the federal government, the court of appeals concluded, its sole remedy lay in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (Pet. App. 5a).

Nevertheless, the court went on to hold that this did not mean the entire action had to be litigated in the Claims Court. The court reasoned that as long as "a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state"—in other words, as long as a dispute will affect the amount of money due in the future as well as the amount of money (if any) past due—"the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief" (Pet. App. 5a). Indeed, the court thought that such an action should proceed in district court in all but "the unusual situation in which the disallowance decision had no significant prospective effect [and] the challenge *only* concerned the money allegedly past due" (*id.* at 4a).[5] The court accordingly held that the district court had properly reached the merits, except insofar as specific services rendered in the past were concerned (see *id.* at 7a & n.2). Significantly, the court added (*id.* at 6a):

> Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here.

On the merits, the court held that petitioners, in determining that services provided by the MDOE were nonreimbursable under Medicaid, had misconstrued the statute. Finding that

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[5] The decision announced one day earlier, *Departmental Grant Appeals Board*, had been such a challenge, because it concerned only services rendered in the past pursuant to a court order that was no longer in effect. Judge Coffin regarded that case as "a rare if not a unique one" (815 F.2d at 789 (concurring opinion)), foreshadowing the suggestion of the court a day later in the present case that it would be highly unusual for a case *not* to be bifurcated into a Tucker Act challenge to disallowance of money allegedly past due and a "prospective" case that could proceed in district court.

"medical" and "educational" services are not necessarily mutually exclusive, the court took the view that "the Secretary [must] develop a Medicaid audit procedure that looks behind the state statutory label 'special education' " to determine whether services are in fact reimbursable as either "medical assistance" or "rehabilitation" services (Pet. App. 16a).

SUMMARY OF ARGUMENT

I. The issues raised in our petition and respondent's cross-petition turn on the interpretation of the general waivers of sovereign immunity found in two statutes: the Administrative Procedure Act (APA) and the Tucker Act. It is undisputed that sovereign immunity has been waived in this case. The dispute turns on which of these statutes supplies the relevant waiver and over what issues. The court of appeals held that insofar as respondent's complaints seek prospective relief—an injunction or a declaratory judgment—the APA supplies the required waiver of sovereign immunity, but that insofar as the complaints seek retrospective relief—money damages—the only applicable waiver of sovereign immunity is that contained in the Tucker Act. Thus, the court of appeals split the case into two actions: an action seeking prospective relief, which could proceed in the district court and regional court of appeals, and an action seeking money damages in excess of $10,000, which under the Tucker Act could proceed only in the Claims Court and the Federal Circuit. Respondent disagrees. In its view, the APA's waiver of sovereign immunity is broad enough to encompass both its claims for prospective relief and its claims for past-due money from the United States. According to respondent, therefore, the entire action could be entertained in the district court. It is our position that respondent's complaint clearly states a claim for money damages, and that the only applicable

waiver of sovereign immunity for such a claim is found in the Tucker Act. Furthermore, given that an action brought in the Claims Court under the Tucker Act will afford respondent an adequate remedy, and given the undesirability of the claim splitting endorsed by the court of appeals, we believe that the entire case should be adjudicated in the Claims Court and the Federal Circuit.

In resolving these jurisdictional questions, the Court should look to three especially relevant provisions of the APA: its limitation to "relief other than money damages"; its prohibition on granting relief that is expressly or impliedly forbidden by another statute; and its limitation to cases in which there is no other adequate remedy in a court. The Tucker Act also has special limitations that are relevant to this case, in particular its remedial limitations and its limitation to cases in which the Act of Congress can fairly be interpreted as implying a right to compensation. But those limitations are met in this case, in which respondent seeks monetary relief and relies on a provision of the Medicaid statute that requires the Secretary to pay states money in accordance with the statute.

II. The court of appeals correctly held that respondents' complaints seek money judgments for which the only applicable waiver of sovereign immunity is the Tucker Act, not the APA. The waiver of sovereign immunity in the APA applies only to "[a]n action in a court of the United States *seeking relief other than money damages*" (5 U.S.C. (Supp. IV) 702 (emphasis added)). Although respondents framed their complaints so as not to seek a money judgment in so many words, it is well established that such a formalistic device as seeking an "injunction" to pay money will not suffice – for either APA purposes or Tucker Act purposes – to convert an attempt to compel the payment of money into something other than a request for a money judgment. Nor is there merit to the theory, which has been adopted by the D.C. Circuit in *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441 (1985), that there exists a peculiar species of money judgments that can be granted under the APA notwithstanding that statute's exclusion of "money damages." The legislative history of the 1976

amendments to the APA, which added the waiver of sovereign immunity to the statute, shows that Congress intended to distinguish all monetary remedies from all nonmonetary remedies, not to distinguish "money damages" (which cannot be awarded under the APA) from some other kind of monetary relief. Respondent thus sought "money damages." Moreover, even if respondent did not seek "money damages," its Tucker Act remedy nevertheless is an "adequate remedy in a court" that precludes an action for past-due money under the APA (5 U.S.C. 704).

III. The court of appeals erred, however, by holding that the district court had properly exercised jurisdiction over respondent's requests for "prospective" declaratory or injunctive relief. Once it is determined that a case *includes* a Tucker Act claim for more than $10,000, over which the jurisdiction of the Claims Court is exclusive, the entire case should be decided by the Claims Court. This rule stems from three factors. First, claim splitting has the general effect of circumventing Congress's careful scheme to centralize monetary claims in the Claims Court and Federal Circuit and creates serious practical problems. There is no indication that Congress intended to permit such a result. Second, the APA's prohibition on the exercise of jurisdiction when there is another adequate remedy in a court affirmatively precludes claim splitting, at least in cases like this one where the Tucker Act remedy is fully adequate. Third, the APA's prohibition on the exercise of jurisdiction when another statute expressly or impliedly forbids the relief sought suggests that any remedial limitations that may exist in the Tucker Act counsel against granting additional remedies in district court, and therefore counsel against claim splitting.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION OVER THIS LAWSUIT

Neither party before this Court agrees with the resolution of the jurisdictional issues in this case by the court of appeals. Respondent contends that the court of appeals erred insofar as

it interpreted respondent's complaints as at least in part stating a cause of action for "money damages" excluded from the APA's coverage by 5 U.S.C. (Supp. IV) 702 and subject instead to the exclusive jurisdiction of the Claims Court under the Tucker Act. If respondent is right, then the district court had jurisdiction over this entire lawsuit, and the court of appeals erred in vacating part of the judgment of the district court on jurisdictional grounds.[6] We, on the other hand, agree with the court's holding that respondent impermissibly sought money damages from the United States in federal district court. Our quarrel with the decision below is its holding that the district court could nevertheless determine the merits of this dispute through the device of claim splitting. In our view, the district court lacked jurisdiction altogether, and the court of appeals should have vacated its judgment and directed transfer of this action, in its entirety, to the Claims Court under 28 U.S.C. 1631.

Both respondent's jurisdictional contentions and ours require an understanding of two statutes that contain general waivers of the sovereign immunity of the United States—the APA and the Tucker Act. We first discuss those statutes and the limitations that Congress has placed in them. We then show that respondent's request that petitioners be "enjoined" from failing to pay respondent allegedly past-due money is not cognizable in district court under the APA. Finally, we show that the court of appeals erred by splitting the cases into two actions and taking jurisdiction over the requests for prospective relief found in respondent's complaints.[7]

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[6] Even if respondent's position on jurisdiction prevails, however, that portion of the judgment could not simply be reinstated because the court of appeals also held that the record was inadequate to suport it (Pet. App. 7a n.2).

[7] The issue of the district court's jurisdiction is properly before this Court even though the government did not press the defense of lack of subject-matter jurisdiction in the district court. It is well established that an appellate court is obliged to consider, as a threshold question, the existence of subject-matter jurisdiction, both its own and that of the lower court. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). When a lower court lacks subject-matter jurisdiction, the appellate court is bound to notice the defect even if it is not raised by the parties; in that event, it has "jurisdiction

I. This Action Can Be Maintained Only in a Court Where the Sovereign Immunity of the United States Has Been Waived

As respondent has recognized (see, *e.g.*, Pet. App. 90a, 96a; 87-929 Cross-Pet. 8), a waiver of sovereign immunity is a jurisdictional prerequisite to the maintenance of this lawsuit. It is "axiomatic" that the United States cannot be sued without its consent. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Furthermore, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). Finally, there is no doubt that this lawsuit, although it named as defendants officials of the Department of Health and Human Services rather than the United States itself, is in substance an action against the sovereign that can proceed only in accordance with the terms of a waiver of sovereign immunity.[8]

Although it is undisputed that sovereign immunity *has* been waived in this case—and that respondent is entitled to judicial resolution of the merits of its claim that the educational services in question are reimbursable under the Medicaid statute—the source of the applicable waiver of sovereign immunity is very much in contention. Respondent maintains that the general waiver of sovereign immunity contained in the APA applies,

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on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' " *Ibid.* (quoting *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)). For these reasons (see also Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982)), the court of appeals correctly determined that it should address the jurisdictional questions in this case, and those issues are likewise properly before this Court.

[8] See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11, 700-704 (1949); see also *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 109-112 & nn.21-22 (1984). But cf. *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1448 n.2 (D.C. Cir. 1985) (raising but not deciding question whether action similar to this one required a waiver of sovereign immunity or could instead be brought as an "officer's suit" against HHS officials).

and that this action was properly brought in the district court. We maintain that the only applicable waiver of sovereign immunity is that found in the Tucker Act and that the action could only be brought in the United States Claims Court.[9] See *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought."); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.").

As respondent correctly observed in its complaints, "[n]o special statutory form of proceeding" exists for actions such as these (Pet. App. 90a, 96a). Thus, the only possible source of a waiver of sovereign immunity in this case is one of two statutes that contain *general* waivers of sovereign immunity: the APA and the Tucker Act. The waiver of sovereign immunity contained in the APA, 5 U.S.C. (Supp. IV) 702, was added to that statute in 1976. See generally Pub. L. No. 94-574, § 1, 90 Stat. 2721; H.R. Rep. 94-1656, 94th Cong., 2d Sess. 4-13 (1976); S. Rep. 94-996, 94th Cong., 2d Sess. 3-12 (1976). It permits an action in any "court of the United States," including, of course, the United States District Court for the District of Massachusetts.[10] The

[9] The Claims Court is an Article I tribunal, created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, that exercises the trial jurisdiction formerly assigned to the United States Court of Claims. See *United States* v. *Mitchell*, 463 U.S. at 228 n.33. Its decisions are appealable under 28 U.S.C. 1295(a)(3) to the United States Court of Appeals for the Federal Circuit, an Article III tribunal created in the same 1982 Act via a merger of the old Court of Claims and the Court of Customs and Patent Appeals. Decisions of the former Court of Claims are binding precedent in the Federal Circuit. *South Corp.* v. *United States*, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc).

[10] The APA is only a waiver of sovereign immunity and does not by itself confer subject-matter jurisdiction on any court. *Califano* v. *Sanders*, 430 U.S. 99 (1977). When APA review is otherwise proper in district court, however, 28 U.S.C. 1331 provides the jurisdictional base of the suit. *Sanders*, 430 U.S. at 105-107. The Tucker Act, by contrast, is both a waiver of sovereign immunity and a jurisdiction-conferring provision. *United States* v. *Mitchell*, 463 U.S. at 212.

waiver of sovereign immunity contained in the Tucker Act, by contrast, confers jurisdiction exclusively on the United States Claims Court when the claims exceed $10,000 in amount. Compare 28 U.S.C. 1491(a)(1) (jurisdiction of Claims Court) with 28 U.S.C. 1346(a)(2) (concurrent jurisdiction of district courts over claims for $10,000 or less). See generally *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 1-2 n.1; *United States* v. *Mitchell*, 463 U.S. at 212 n.10; *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 734-725 n.5 (1982). The amounts at issue in this case far exceed $10,000.[11] It is therefore clear that the district court properly exercised jurisdiction over this case, either in whole or in part, only if the APA's waiver of sovereign immunity applies.

The APA conditions its waiver of sovereign immunity in three important ways. See generally Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity*, 29 Admin. L. Rev. 265, 270-271 (1977). First, Section 702 itself, in the very sentence that waives sovereign immunity, limits the scope of the waiver to "action[s] • • • seeking relief other than money damages." Sec-

[11] Plaintiffs may—and sometimes do—waive all recovery in excess of $10,000 in order to preserve the "Little Tucker Act" jurisdiction of the district court. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1156 n.8 (Fed. Cir. 1983); *Hohri* v. *United States*, 586 F. Supp. 769, 781 n.19 (D.D.C. 1984), aff'd in part and rev'd in part, 782 F.2d 227 (D.C. Cir. 1986), vacated, No. 86-510 (June 1, 1987). In such cases, although the action is not tried in the Claims Court, appeal nevertheless lies exclusively in the Federal Circuit. See 28 U.S.C. 1295(a)(2); *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 11; *United States* v. *Hohri*, slip op. 7-8. Although the matter is not entirely free from doubt, we believe that plaintiffs also may waive *all* monetary recovery—permanently forgoing any Tucker Act claim arising out of prejudgment events—and thereby litigate their cases for nonmonetary relief in the district court and regional court of appeals. Compare, *e.g.*, *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (allowing judicial review of decision of Board for Correction of Naval Records in district court and regional court of appeals because "Blassingame has expressly relinquished any claim for monetary relief"), with *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (noting general availability of judicial review of such decisions in the Claims Court). Respondent, however, has never indicated a desire to forgo any or all of its claim for past-due money as a means of preserving the jurisdiction of the district court and/or the regional court of appeals.

ond, Section 702 also provides that "[n]othing herein • • • confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Third, 5 U.S.C. 704 limits "nonstatutory" APA review to cases of "final agency action for which there is no other adequate remedy in a court."[12] Each of these three conditions, as a limitation on the waiver of sovereign immunity, must be stricly construed.[13] As we explain in Parts II and III below, it is principally these explicit limitations in the APA that deprive the district court of jurisdiction over any portion of this lawsuit.

The Tucker Act – which in our view is the applicable waiver of sovereign immunity in this case – has its own peculiar limitations. Some of those limitations, as applicable to this case, were sketched out by this Court in *United States* v. *Mitchell*, 463 U.S. at 216-217 (footnotes and citations omitted):

> [T]he Tucker Act " 'does not create any substantive right enforceable against the United States for money damages.' " A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' "

Each of these requirements for Tucker Act jurisdiction is met in the present case.

The substantive right that respondent seeks to enforce against the United States is based on the Medicaid statute. If respondent has correctly interpreted that statute to cover the special educational services at issue in this case, then the Secretary's obligation to reimburse a portion of the costs of those services is clear and undisputed: according to 42 U.S.C. 1396b(a), "the Secretary • • • shall pay" the appropriate sums to respondent. Thus, the source of substantive law on which respondent relies can fairly be interpreted (if respondent is right on the merits) as mandating compensation by the federal government for the "damage" sustained (*i.e.*, payment of the amount of reimbursement incorrectly withheld).[14]

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[12] Section 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." This section sets forth two possible causes of action: statutory review ("[a]gency action made reviewable by statute") and nonstatutory or APA review ("final agency action for which there is no other adequate remedy in a court"). See generally, *e.g.*, H.R. Rep. 94-1656, *supra*, at 13-14 (discussing nonstatutory review); S. Rep. 94-996, *supra*, at 12-13 (same); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1480-1481 & n.3 (1962). The present case, as we have noted, falls within the latter category.

[13] See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941) ("The section must be interpreted in light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."); see also *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 ("we must construe waivers strictly in favor of the sovereign"); *United States* v. *Mottaz*, *supra*; P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1351 (2d ed. 1973).

[14] The Federal Circuit has in fact reviewed under the Tucker Act cases brought to compel payment of sums allegedly due under federal grant-in-aid programs. See, *e.g.*, *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573 (1987), cert. denied, No. 87-909 (Jan. 25, 1988); see also *Chula Vista City Sch. Dist.* v. *Bennett*, 474 U.S. 1098 (1986) (order) (vacating Ninth Circuit's judgment in same case because that court lacked jurisdiction over appeal in Tucker Act action). The court has not always identified, among the several different heads of Tucker Act jurisdiction (see generally *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)), the precise basis on which jurisdiction has rested. In our view, when (as in this case) a grantee participating in a federal grant-in-aid program sues, invoking a statute that requires the federal government to pay the grantee money on certain conditions and arguing that those conditions have been met, the action fits comfortably within the branch of Tucker Act jurisdiction based on a statute that can fairly be interpreted as mandating compensation. See *Mitchell*, 463 U.S. at 217. But see *Maryland Dep't of Human Resources* v. *Department of Health and Human Services*, 763

Nor can it be doubted that respondent seeks "money damages" as this Court used that term in *Mitchell*.[15] Whatever "money damages" may mean for purposes of the APA—a disputed question that we discuss in Part II.A below—it is clear beyond dispute that in the Tucker Act context "money damages" means any judgment for the payment of money. We know of only one court that has construed the term "money damages" under the APA to mean something other than a judgment for the payment of money; but even that court conceded, *for purposes of the Tucker Act*, that "historic practice • • • seems to have drawn a line between monetary relief (whether awarded as damages or not) and nonmonetary relief, rather than following" what the court viewed as "the more traditional common law distinction between money damages and specific relief (whether involving money or not)." *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1447 (D.C. Cir. 1985) (*MDHR* v. *HHS*).

The term "money damages" is in fact not found in the Tucker Act at all; the statute refers only to "claim[s]" and nowhere uses the word "money" or any variant thereof. Rather, "money damages" is a shorthand phrase that this Court has often

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F.2d 1441, 1450-1451 (D.C. Cir. 1985) (action by grantee held not cognizable under Tucker Act despite existence of statutory obligation to pay); cf. *Sarasota* v. *EPA*, 799 F.2d 674 (11th Cir. 1986) (action by *prospective* grantee held not a Tucker Act action).

[15] To be sure, respondent has carefully framed its complaints to avoid terms normally used by one seeking a money judgment. Respondent apparently contends that this form of draftsmanship can suffice to *create* an APA-based cause of action that *would not* exist if the complaint were framed to seek money more directly. We refute that argument at pp. 21-23, *infra*, but for present purposes it suffices to observe that we doubt that anyone would seriously contend that drafting a complaint in "injunctive" terms suffices to *defeat* a Tucker Act-based cause of action that *would* exist if the complaint were framed to seek money more directly. Certainly, the courts whose jurisdiction is defined by the Tucker Act have regularly entertained actions in which the complaints were, like the ones in this case, framed to avoid the appearance of seeking a money judgment. See, *e.g.*, *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 557-558 (Fed. Cir. 1986); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435 (Ct. Cl. 1979).

used—interchangeably with other phrases describing monetary recoveries—to describe the limitations, inferred from legislative context, on the jurisdiction conferred by the Tucker Act.[16] For example, this Court has described the fundamental purpose of the Court of Claims as being the "payment of debts" (*Glidden Co.* v. *Zdanok*, 370 U.S. 530, 548 (1962) (opinion of Harlan, J.))—a form of monetary payments that would surely not be regarded as "damages" if a distinction were to be drawn between "damages" and other types of monetary remedies. Thus, "money damages" is, for Tucker Act purposes, synonymous

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[16] See, *e.g.*, *United States* v. *King*, 395 U.S. 1, 2-3 (1969) (jurisdiction of Court of Claims "limited to money claims against the United States Government"); *id.* at 3 (quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867)) (" 'the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner' "); *ibid.* (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962) (opinion of Harlan, J.)) (" '[f]rom the beginning [the Court of Claims] has been given jurisdiction only to award damages . . . .' "); *ibid.* (suggesting that jurisdiction of Court of Claims extends to actions for "actual, presently due money damages from the United States"); *id.* at 4 ("cases seeking relief other than money damages from the Court of Claims have never been 'within its jurisdiction' "); *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976) (repeating these passages from *King*); *United States* v. *Hohri*, slip op. 7 n.4 (describing all Tucker Act claims as "claims for money damages"); *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. at 738-740 (describing backpay claim as a claim for money damages); *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973) (per curiam) ("the Act has long been construed as authorizing only actions for money judgments"); *United States* v. *Jones*, 336 U.S. 641, 670 (1949) ("the Court of Claims has jurisdiction only to render a money judgment against the United States"); *United States* v. *Sherwood*, 312 U.S. 584, 588 (1941) ("it has been uniformly held, upon a review of the statutes creating the [Court of Claims] and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States"); *United States* v. *Jones*, 131 U.S. 1, 18 (1889) (under Tucker Act, "in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands"); see also *Fidelity Constr. Co.* v. *United States*, 700 F.2d 1379, 1384 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983); *Eastport S.S. Corp.* v. *United States*, 372 F.2d at 1008; *Larionoff* v. *United States*, 533 F.2d 1167, 1181 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977); Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179, 179 & n.3 (1961).

with "money judgment"; the word "damages" has never been used as a limitation on the kinds of money judgments that the Claims Court may enter.

There is one further important limitation on the waiver of sovereign immunity effected by the Tucker Act. Courts exercising jurisdiction under that Act have since 1972 been given certain carefully limited equitable powers. See 28 U.S.C. 1491(a)(2) and (3). This marks a departure from the historical rule, which was that the Court of Claims had no equitable powers of any kind. See cases cited in note 16, *supra; Lee* v. *Thornton*, 420 U.S. 139 (1975) (per curiam). Since 1972, however, the court has had the power, among others, to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)), so long as the "case" is first properly determined to be "within its jurisdiction" (*ibid.*; see *United States* v. *Testan*, 424 U.S. at 404 & n.7).

In sum, Congress has enacted two general waivers of sovereign immunity, each addressing an extremely broad range of subject matters but each also carefully crafted to restrict which actions may be brought and which remedies plaintiffs may seek and obtain. It is against those two carefully crafted statutory schemes, and their limitations, that respondent's attempt to invoke the jurisdiction of the district court must be measured.

II. The Administrative Procedure Act Does Not Waive the Sovereign Immunity of the United States for an Action in District Court Seeking the Payment of Money Allegedly Due to the Plaintiff Under a Federal Grant-in-Aid Program

Respondent contends, contrary to the holding of the court of appeals, that "section 702's waiver of sovereign immunity encompasses the Commonwealth's complaint for judicial review * * * in its entirety" (87-929 Cross-Pet. 8). In our view, however, Section 702 is inapplicable to respondent's request for an "injunction" to pay money because that statute waives sovereign immunity only for "[a]n action * * * seeking relief other than money damages." Furthermore, even if that obstacle were overcome, the request for an injunction to pay money would be beyond the scope of the APA because the Tucker Act provides respondent an "adequate remedy" to secure the monetary relief it seeks in the Claims Court, so that Section 704 forbids APA review.

A. An Action Seeking Allegedly Past-Due Money Under a Federal Grant-in-Aid Program Is an Action for "Money Damages," for Which the Administrative Procedure Act Does Not Waive Sovereign Immunity

Respondent has not yet explained why its demand that the district court "enjoin" petitioners from failing to pay past-due money is cognizable under the APA notwithstanding that statute's exclusion of "money damages" from the scope of its waiver of sovereign immunity. Nevertheless, two theories appear possible. One stems from respondent's contention that it "never sought" a money judgment, apparently on the theory that an injunction to pay money is not a money judgment (87-929 Cross-Pet. 12; see 87-712 Br. in Opp. 17). The other stems from the D.C. Circuit's decision in *MDHR* v. *HHS*, *supra*, holding that a grantee's action to recover money allegedly due from the federal government as reimbursement for past services is not an action for "money damages" within the meaning of the APA. Neither theory withstands scrutiny.

1. An Action Seeking to "Enjoin" a Federal Official to Pay Money or to "Declare" that the Federal Government Is Liable to the Plaintiff Is an Action for a Money Judgment

In this case, respondent filed two complaints in federal district court, each seeking "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified sum] in federal financial participation due to the Commonwealth of Massachusetts" (Pet. App. 89a-90a, 95a-96a). Each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of

expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a, 98a). Respondent claims in these two complaints that it has a legal right to $11,323,958 in reimbursement for 1978-1982 Medicaid expenses and seeks to have the courts determine the merits of that claim of entitlement (see *id.* at 92a-93a, 98a-99a).

The court of appeals was correct in its determination that these requests should be treated no differently from a request, in terms, for a money judgment. *Every* complaint seeking the recovery of money could be framed as a request for an "injunction" against nonpayment of that money. If artful pleading sufficed to create an APA-based cause of action, then the exclusion of "money damages" in the statute would become nothing but a trap for the unwary plaintiff's lawyer who neglected to frame his monetary request in "injunctive" (or "declaratory") terms. Congress plainly intended no such capricious result when it amended the statute in 1976.

The courts of appeals have uniformly rebuffed efforts to evade the limitations imposed by Congress on the APA's waiver of sovereign immunity by the mere device of framing a complaint in "equitable" terms. They have consistently recognized that cases seeking monetary relief are actions cognizable, if at all, only under the Tucker Act. See, *e.g.*, *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987), cert. denied, No. 87-909 (Jan. 25, 1988); *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 361 (5th Cir. 1987), petition for cert. pending, No. 87-372; *Wronke* v. *Marsh*, 767 F.2d 354, 355 (7th Cir. 1985), cert. denied, No. 86-193 (Oct. 6, 1986); *Chula Vista City Sch. Dist.* v. *Bell*, 762 F.2d 762, 764-765 (9th Cir. 1985), vacated on other grounds, 474 U.S. 1098 (1986); *Van Drasek* v. *Lehman*, 762 F.2d 1065, 1071 n.11 (D.C. Cir. 1985); *United States* v. *City of Kansas City*, 761 F.2d 605, 608-609 (10th Cir. 1985); *Hahn* v. *United States*, 757 F.2d 581, 589 (3d Cir. 1985); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331, 336 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *Minnesota ex rel. Noot* v.

Heckler, 718 F.2d 852, 859 n.12 (8th Cir. 1983); *B.K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 727 (2d Cir. 1983); *Portsmouth Redevel. & Hous. Auth.* v. *Pierce*, 706 F.2d 471, 474 (4th Cir.), cert. denied, 464 U.S. 960 (1983); *Bakersfield City Sch. Dist.* v. *Boyer*, 610 F.2d 621, 628 (9th Cir. 1979); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 436 (Ct. Cl. 1979); *Carter* v. *Seamans*, 411 F.2d 767, 771 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

These decisions are in accord with this Court's disposition of a closely analogous question in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). The court of appeals in that case sought to justify an award of money from a state treasury, in the face of the State's Eleventh Amendment immunity from such awards, by phrasing its order to pay money in "equitable" terms. This Court, however, rejected the proposition that "any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature" (*id.* at 666). The Court wrote: "While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668. So too here, there is simply no practical difference between an "injunction" ordering petitioners to pay federal money to respondents and a money judgment against the United States. If the monetary relief demanded in respondent's complaints may be sought in district court under the APA, it must be because those complaints *in substance* do not seek "money damages" as Congress used that term, not because of the way in which the complaints have been drafted.

2. An Action for a Money Judgment Is an Action for "Money Damages" Within the Meaning of the Administrative Procedure Act

a. In *MDHR* v. *HHS*, *supra*, as we have observed, the D.C. Circuit recognized the "historic practice" under the Tucker Act of drawing a line between "monetary relief (whether awarded as damages or not) and nonmonetary relief" (763 F.2d at 1447). The former category of relief—which this Court has regularly referred to as "money damages" (see note 16, *supra*)—may be granted under the Tucker Act in appropriate cases. The latter category of relief may not be granted under the Tucker Act (except in certain instances in which it is incidental to monetary relief and is supported by specific statutory authority added to the Act since 1972). In our view (which was shared by the court of appeals), the term "money damages" in the APA was meant to draw the same distinction: monetary relief simply does not come within Section 702's waiver of sovereign immunity, but nonmonetary relief generally does (subject, of course, to the statute's other limitations). Accordingly, we submit that respondent's claims for "money damages" fall outside the APA's terms.

The D.C. Circuit took a contrary view in *MDHR* v. *HHS*. The court dismissed the commonsense distinction between monetary and nonmonetary relief as an "obscure feature of Tucker Act jurisdiction" that Congress was unlikely to have had "in mind" when it drafted Section 702 (763 F.2d at 1447). Instead, the court suggested that the phrase "money damages" should be read in reference to an esoteric distinction, which the court identified as coming from the common law, between "money damages" and court-ordered payments of money that constitute not damages but "specific remedies." *Id.* at 1446 (citing D. Dobbs, *Handbook on the Law of Remedies* 135 (1973)).[17] Under this distinction, the court reasoned, actions

[17] Although the D.C. Circuit stated that the distinction is an established and traditional feature of the common law, it is far from clear to us that the common law did in fact draw any such sharp distinction between "money damages" and a " 'money award [that] is also a specie remedy' " (763 F.2d at 1446 (quoting D. Dobbs, *supra*, at 135)). For example, in its chapter on specific performance, a leading treatise on the American common law of contracts refers to monetary remedies generally as something to be *contrasted* with specific relief. See 5A A. Corbin, *Corbin on Contracts* § 1139, at 111 (1964) ("the more common remedy [than specific performance] for breach of a contract is a judgment for compensation in money"); *id.* § 1142, at 119 (footnote omitted) ("In the case of money debts or other unilateral contracts for the mere payment of money, there is generally no difficulty in determining the amount of damages. • • • [A] suit for specific performance, in so far as that involves any difference from the money judgment, is not maintainable.").

seeking allegedly past-due reimbursement under federal grant-in-aid programs seek a form of "specific relief" and thus do not run afoul of the APA's exclusion of actions seeking "money damages."[18]

[18] The D.C. Circuit's analysis, however, is complex and would require an additional inquiry before it could be finally determined whether the monetary part of this action was properly brought in district court. *After* determining that the action before it was not removed from the district court's jurisdiction by the APA's exclusion of "money damages," the D.C. Circuit held that it must also inquire whether the action was also cognizable under the Tucker Act and, if so, whether the Tucker Act "impliedly forbids" relief under the APA (763 F.2d at 1448-1449). The court then held that Title XX of the Social Security Act, 42 U.S.C. (& Supp. III) 1397 *et seq.*, cannot fairly be interpreted as mandating compensation by the federal government, so that there was no available Tucker Act remedy (763 F.2d at 1450-1451). Thus, the court concluded that an APA action was available.

We think the D.C. Circuit's analysis of Title XX was wrong—the statute contains an express payment-mandating provision (42 U.S.C. (& Supp. III) 1397a)—but in any event the court's reasoning exposes a serious flaw in its whole framework of analysis. The point of the *Eastport Steamship* test (requiring a money-mandating statute as a condition precedent to Tucker Act jurisdiction) is to distinguish those cases in which the federal government has opened up the federal treasury from those cases in which no source of positive law reflects a governmental intention to compensate those who complain of violations of law. See generally, *e.g.*, *United States* v. *Testan*, *supra*. Under the D.C. Circuit's analytic framework, however, this scheme is turned upside down. Plaintiffs can obtain money from the federal treasury whether or not they can identify a money-mandating statute; the only difference between those who can and those who cannot identify such a statute is that the former are required to proceed in the Claims Court under the Tucker Act whereas the latter are permitted to proceed under the APA and take advantage of its generally more liberal remedial provisions in addition to obtaining money.

Like the First Circuit, we think "[t]he legislative history can, and * * * should, be read otherwise." *Departmental Grant Appeals Bd.*, 815 F.2d at 782; see also *New Mexico* v. *Regan*, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858-859 (8th Cir. 1983). With all due respect, it is the D.C. Circuit's position, not ours, that implausibly inserts an "obscure feature" of remedial law into Congress's collective "mind" in 1976. Even if the common law of remedies can be said to reflect a distinction between "money damages" and monetary "specific relief," the legislative history contains not a shred of evidence that Congress had such common law categories in mind when it enacted the waiver of sovereign immunity in the APA.[19] On the other hand, there *is* ample indication that Congress had the Tucker Act very much "in mind" when it used the words "money damages," and that in this context, as under the Tucker Act, the phrase is synonymous with "monetary relief."

b. The waiver of sovereign immunity that Congress added to the APA in 1976 was the direct result of years of advocacy by

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[19] There is an additional oddity in the D.C. Circuit's view that a waiver of the sovereign immunity of the United States should be construed by reference to distinctions allegedly drawn in the common law. Suits against the United States are, invariably, not "suits at common law." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (opinion of Harlan, J.). It is therefore unclear why the common law of remedies should be thought a particularly useful guide to construction of the statutes that allow such suits. Rather, the pre-1976 conception of sovereign immunity would seem to be the most appropriate source of guidance on just what protections Congress was – and was not – waiving in the 1976 amendments to the APA. In the larger context of sovereign immunity that formed the backdrop for the 1976 amendments to the APA, this Court had not generally drawn the distinction, espoused by the D.C. Circuit in *MDHR* v. *HHS*, between "money damages" and monetary "specific relief." Rather, this Court had distinguished between monetary and nonmonetary relief. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. at 704 ("[I]t is one thing [for Congress] to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act."); but cf. *id.* at 688 (contrasting "damages" and "specific relief" and including in the latter category "the recovery of specific property or monies").

leading administrative law scholars. See, *e.g.*, Byse, *supra*, 75 Harv. L. Rev. at 1523-1531; Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970); Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383 (1970).[20] Statutes waiving sovereign immunity, similar to the one eventually enacted, were proposed by these scholars and by the Administrative Conference of the United States (see 5 U.S.C. 571-576) in the 1960s and early 1970s. See generally 121 Cong. Rec. 3987 (1975) (remarks of Sen. Kennedy).

The version of Section 702 proposed by the Administrative Conference in 1969 was, in all respects pertinent to this case, worded identically to the section that now appears in the United [1] States Code. Compare *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judicary*, 91st Cong., 2d Sess. 90 (1970) [hereinafter *1970 Hearing*] (reprinting Administrative Conference proposal) with 5 U.S.C. (Supp. IV) 702.[21] In particular, it limited the waiver of sovereign immunity to actions "seeking relief other than money damages." Hearings on the proposals to waive sovereign immunity were held both in 1970 and in 1976. See *1970 Hearing; Administrative Procedure Act Amendments of 1976: Hearings on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296, and S. 3297 Before the Subcomm. on Admin. Practice*

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[20] See generally *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). In this hearing, the article by Professor Davis that we have cited in the text above is reprinted in full (*id.* at 201-223), as are three memoranda by Professor Cramton on behalf of the Committee on Judicial Review of the Administrative Conference of the United States (*id.* at 77-91, 92-156, 157-200). Professor Byse's leading role in the process that gave rise to the proposed statute is acknowledged often in these materials (see, *e.g.*, *id.* at 116, 237).

[21] The proviso that now appears in Section 702, pertaining to the specification of officers responsible for compliance with decrees, did not appear in the Administrative Conference proposal but was added later at the suggestion of Assistant Attorney General Scalia. See S. Rep. 94-996, *supra*, at 1-2, 26-27.

and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) [hereinafter *1976 Hearings*]. All of these materials – the law review articles and the 1970 hearing as well as the materials generated by the 94th Congress – shed light on Congress's purpose in excluding "money damages" from the APA's waiver of sovereign immunity, and all of them decisively refute the D.C. Circuit's interpretation of the congressional action.

Preservation of the Tucker Act – and its review-limiting features – was a persistent theme of the law reformers. For example, Professor Byse wrote that any new statute waiving immunity "should be so phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes, such as the Tucker Act and the Federal Tort Claims Act, in which Congress has conditionally consented to suit" (75 Harv. L. Rev. at 1525 (footnote omitted)).[22] Professor Davis wrote that the purpose of what is now 5 U.S.C. (Supp. IV) 702(2) was "to avoid making any change in the interpretation of other statutes granting consent to suits against the government, including the Court of Claims Act, the Tucker Act, and the Federal Tort Claims Act" (22 Admin. L. Rev. at 404; *1970 Hearing* 222). He added (*ibid.*): "If any statute such as these is interpreted to forbid a suit for specific performance, then that interpretation remains unchanged by the present proposal. The intent of Congress as expressed or implied in other statutes remains undisturbed." Professor Cramton made similar observations (68 Mich. L. Rev. at 435).[23]

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[22] In discussing his own proposal, Professor Byse wrote: "Since the proposal would permit the court to dismiss or deny relief where the plaintiff sought expenditure of federal funds, the various limitations contained in the Tucker and Tort Claims statutes would not be affected" (75 Harv. L. Rev. at 1529).

[23] The Tucker Act also was seen as a statute that might provide an adequate remedy and therefore (see 5 U.S.C. 704) preclude an APA-based action. For example, Professor Byse explained that the abolition of sovereign immunity would negate the actual ground of decision in *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, but that the same result might have been reached "on the ground • • • that the plaintiff had an adequate legal remedy for money damages under the Tucker Act" (75 Harv. L. Rev. at 1530 n.157; see also Cramton, *supra*, 68 Mich. L. Rev. at 405).

Likewise, the law reformers – without distinguishing "damages" actions from other kinds of actions for money – disclaimed any intention to waive sovereign immunity for actions seeking payments from the federal treasury. Professor Byse's proposed statute, for example, would have preserved as a ground for dismissal the objection "that the relief requested • • • would compel the disbursement of funds belonging to the United States" (75 Harv. L. Rev. at 1528). Professor Davis described one of the "two main purposes" of the Administrative Conference's proposed statute as being "to allow the plaintiff in any suit for relief *other than money* to name the United States as defendant" (22 Admin. L. Rev. at 403; *1970 Hearing* 221 (emphasis added)), and he described that draft statute's "other than money damages" provision as a "[l]imitation of [the] proposal to relief other than money" (*id.* at 404; *1970 Hearing* 222 (emphasis omitted)). "The proposed amendment will mean only that when a party who is hurt by governmental action seeks relief *other than money*, sovereign immunity will not be a bar to judicial determination of • • • legal questions" (*id.* at 405; *1970 Hearing* 223 (emphasis added)). Professor Cramton wrote of the Administrative Conference proposal that its "explicit exclusion of *monetary relief* makes it clear that sovereign immunity is abolished only in actions for specific relief" (68 Mich. L. Rev. at 429 (emphasis added; footnote omitted)).

The 1970 hearing built on, and is entirely consistent with, the views expressed in these law review articles. Professor Cramton, on behalf of the Administrative Conference, presented a lengthy statement and testified in the 1970 hearing (see *1970 Hearing* 16-55). The Administrative Conference proposal was further explained in a memorandum by Professor Cramton, which stated as follows (*1970 Hearing* 118 (emphasis added)):

> Although the recommendation does not use the term "specific relief," the principal effect of the amendment will be to cut off the defense of sovereign immunity in suits for specific relief. Perhaps ninety per cent of the cases affected will be suits for injunction or declaratory judgment or for

> both, and perhaps most of the rest will be suits for relief in the nature of mandamus. But all other specific relief is covered, including specific performance, quieting title, ejectment and habeas corpus. *All forms of monetary relief, however, are excluded from the recommendation.*

See also *id.* at 139 ("the language of our proposal, which is applicable in terms only to actions 'seeking relief other than money damages,' indicates that sovereign immunity remains as a defense to actions seeking monetary relief"); *id.* at 31, 140.

Another key witness at the 1970 hearing was Dan M. Byrd, Jr., representing the Administrative Law Section of the American Bar Association, which had worked together with the Administrative Conference to develop the legislative proposal. Mr. Byrd stated that the amendment sought to permit "all [specific relief] remedies except those 'concerning monetary relief and specific relief in lieu thereof' " (*1970 Hearing* 58). Mr. Byrd then expanded on his reference to "monetary relief and specific relief in lieu thereof" (*ibid.* (emphasis added in part)):

> *The meaning of the exception about monetary relief.* All suits seek either monetary or non-monetary relief. Because the present law concerning sovereign immunity in suits for monetary relief is reasonably satisfactory on account of such legislation as the Court of Claims Act, Tucker Act, and Federal Tort Claims Act, the proposed amendment does not affect suits for monetary relief. It applies only to suits for non-monetary relief. The exception of "existing law concerning monetary relief and specific relief in lieu thereof" is designed to make clear that not only suits for money *but also substitutes for suits for money are unaffected by the proposed amendment. Examples of specific relief in lieu of monetary relief include a suit for specific performance of an agreement to pay money, a suit for a declaratory judgment that the United States is legally obligated to pay money to the plaintiff, and a suit for an injunction against action which interferes with payment.*

These two passages demonstrate that – contrary to the D.C. Circuit's analysis – the term "money damages" was intended to include *all* forms of monetary relief. Mr. Byrd's remarks in particular refute any contention that either the form or the substance of a plaintiff's requests for money should suffice to escape from the APA's requirement that district court actions seek "relief other than money damages."

The legislative history emanating from the Congress that actually enacted the waiver of sovereign immunity, although perhaps less illuminating than the materials we have already quoted, is again entirely consistent with those materials. The committee reports on the 1976 amendments stated as follows (H.R. Rep. 94-1656, *supra*, at 11 (emphasis added); S. Rep. 94-996, *supra*, at 10 (emphasis added)):

> The first of the additional sentences [in section 702] provides that claims challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. *The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgment, mandatory relief, etc.).* Thus, limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected.

This passage uses the terms "money damages" and "monetary relief" interchangeably and opposes money in general to "specific relief." It also disavows any intent to affect Tucker Act jurisdiction.

Another passage in the committee reports identifies "monetary liability" and "money damages" and opposes them to other forms of relief; it also makes express Congress's intent that the courts interpret Section 702 in light of the Tucker Act (H.R. Rep. 94-1656, *supra*, at 4-5 (emphasis added); S. Rep. 94-996, *supra*, at 3-4 (emphasis added)):

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act * * *. S. 800 [*i.e.* the amendments

> to 28 U.S.C. 1331 and 5 U.S.C. 702] would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking *relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus*. Since S. 800 would be limited only to actions of this type for specific relief, the recovery of money damages contained in the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected.

The reports contain other similar references. See generally H.R. Rep. 94-1656, *supra*, at 1-11; S. Rep. 94-996, *supra*, at 1-12. Thus, the committee reports demonstrate that the Tucker Act, "obscure feature[s]" (*MDHR* v. *HHS*, 763 F.2d at 1447) and all, was very much "in mind" (*ibid.*) when Congress limited the APA waiver of sovereign immunity by excluding actions for "money damages."[24]

c. Against all of this legislative history stands the D.C. Circuit's assertion that a reference in the 1976 House report to litigation involving federal grant-in-aid programs makes it "virtually conclusive" that Congress intended to permit such ligitation to be brought under the APA. *MDHR* v. *HHS*, 763 F.2d at 1447-1448; see H.R. Rep. 94-1656, *supra*, at 9; see also S. Rep. 94-996, *supra*, at 8. In the D.C. Circuit's view, litigation involving federal grant-in-aid programs would ordinarily seek specific monetary relief, and therefore the APA's exclusion of "money damages" should not be read to preclude an award of money by district courts in cases like this one.

[24] Shortly after the 1976 amendments to the APA were passed, one commentator observed that "the non-applicability to suits seeking money damages clearly refers principally to suits under the Tucker and Tort Claims Acts" (Jacoby, *supra*, 29 Admin. L. Rev. at 271). Professor Jacoby also made observations about the interplay between the new statute and some of this Court's Tucker Act decisions. In his view, this Court's interpretation of the Tucker Act in *United States* v. *Testan*, *supra*, would "be unaffected because • • • it was an action seeking monetary relief with respect to which the new amendment of 5 U.S.C. § 702 was expressly made inapplicable." As to this Court's interpretation of the Tucker Act in *United States* v. *King*, *supra*, Professor Jacoby thought that the statute "would again have no effect since the last clause of the amendment of 5 U.S.C. § 702 specifically prohibits granting relief if any other consent statute 'expressly or impliedly forbids the relief which is sought.' It would seem that the Tucker Act is a statute which 'impliedly' forbids declaratory relief." 29 Admin. L. Rev. at 283-284 (footnote omitted).

A closer examination of this reference in the 1976 legislative history, however, casts doubt on the D.C. Circuit's assumption that Congress equated grant-in-aid litigation with attempts to secure monetary relief. The references to federal grant-in-aid programs in the 1976 committee reports specifically note that they are taken from the 1970 hearing. See H.R. Rep. 94-1656, *supra*, at 9 & n.27; S. Rep. 94-996, *supra*, at 8 & n.27. Review of the 1970 hearing shows that the entire passage in the 1976 committee reports, including the reference to federal grant-in-aid programs, was taken virtually verbatim from a statement prepared by Professor Cramton for the 1970 hearing, which simply lists "administration of federal grant-in-aid programs" as one source of controversies giving rise to sovereign immunity problems. See *1970 Hearing* 23.[25] Professor Cramton elaborated somewhat on the basis for his reference to federal grant-in-aid programs in a memorandum on sovereign immunity submitted on behalf of the Administrative Conference. See *1970 Heaing* 121. Professor Cramton cited two cases as examples of the sovereign immunity defenses that had arisen in federal grant-in-aid cases: *Lee County Sch. Dist. No. 1* v. *Gardner*, 263 F. Supp. 26 (D.S.C. 1967), and *Dermott Special Sch. Dist.* v. *Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968).[26] Exam-

[25] Professor Cramton's statement read as follows (*1970 Hearing* 23):

> Cases in which the doctrine [of sovereign immunity] has been invoked have included challenges to agricultural regulations, governmental employment, tax investigations, postal-rate matters, administration of labor legislation, control of subversive activities, food and drug regulation, administration of federal grant-in-aid programs, and many others.

See also Cramton, *supra*, 68 Mich. L. Rev. at 422-423.

[26] Professor Cramton also cited *Congress of Racial Equality* v. *Social Security Administration*, 270 F. Supp. 537 (D. Md. 1967), but that case involved guidelines for equal opportunity in federal employment, not a grant-in-aid program.

ination of the cases, however, reveals that in neither case did the plaintiff seek to require the government to pay or to cease withholding federal funds. Instead, both cases involved challenges to federal inaction or regulatory guidelines, and success in those challenges would not have resulted in the payment of federal funds. *Lee County*, for example, involved a challenge to the federal agency's decision to defer action on applications for federal funds under certain education programs. The relief sought was to force the agency to act on the applications: whether the applications would be granted or denied would be the product of an independent agency decision.[27] Similarly, *Dermott* involved a challenge to guidelines establishing requirements for federally funded programs. The few references to federal grant-in-aid programs in the legislative history, therefore, hardly support a conclusion—contrary to the rest of the legislative history—that Congress intended to allow the APA to be used for the recovery of money.

In sum, the legislative history of the APA strongly supports the view that the words "money damages" should be read to mean any monetary relief, whether it is in the nature of damages or in the nature of "specific relief." The D.C. Circuit's contrary reading of the legislative history is incorrect and cannot properly be used to support respondents' effort to litigate this case in federal district court rather than the Claims Court.

B. Even if an Action Seeking Money Under a Federal Grant-in-Aid Program Is Not an Action for "Money Damages," the Administrative Procedure Act Is Inapplicable Because the Tucker Act Provides an "Adequate Remedy in a Court"

Even if one were to accept the D.C. Circuit's view that an action to recover federal grant funds is not an action for "money damages" within the meaning of the APA, it would not follow that such an action may be pursued in district court. The D.C.

[27] There is language in *Lee County* (see, *e.g.*, 263 F. Supp. at 30) indicating that the government had argued that "the complaint seeks an order directing them to pay over property of the government, in the form of funds." The court, however, clearly viewed the school district as instead actually challenging "the legality of the deferrals" (*id.* at 33).

Circuit itself recognized this (see note 18, *supra*). That court suggested that the existence of a Tucker Act remedy in the Claims Court for the complained-of withholding of funds might "impliedly forbid" the grant of relief under the APA. That may be correct, but in our view the D.C. Circuit overlooked a simpler reason why the availability of monetary redress under the Tucker Act necessarily precludes the maintenance of an action for the recovery of money in district court. The APA does not support an action seeking nonstatutory review of administrative action unless there is "no other adequate remedy in a court" (5 U.S.C. 704). As we have seen, relief under the Tucker Act is precisely the kind of remedy that Congress thought might be "adequate" and therefore might preclude nonstatutory review under the APA (see note 23, *supra*).[28]

Whatever might be said about the adequacy of a Tucker Act remedy vis-à-vis nonmonetary claims, a Tucker Act remedy for monetary claims, when it exists, provides exactly the *same* redress—payment of money—that a plaintiff seeks in an action under the APA to enjoin the government to pay. In this case, as observed at pp. 16-20, *supra*, a Tucker Act remedy for petitioners' alleged misconstruction of the Medicaid statute exists. Thus, respondent clearly has an "other adequate remedy in a court." Accordingly, Section 704 independently precludes respondent from maintaining the monetary part of this action in district court, and the judgment of the court of appeals should in this respect be affirmed.

[28] For this reason, as explained more fully at pp. 43-44, *infra*, the availability of a Tucker Act remedy in the Claims Court should be held to preclude the exercise of jurisdiction by the district court over the "prospective" portion of this case as well as the exercise of jurisdiction over the monetary part of the case. The discussion in the text above, however, is confined to the proposition that Section 704 is an independent basis to uphold the ruling of the court of appeals that the monetary portion of this case belongs in the Claims Court.

III. A District Court May Not Assert Jurisdiction Over an Action Seeking "Prospective" Declaratory or Injunctive Relief Based on the Same Legal Theories That Underlie the Plaintiff's Tucker Act Claim for Past-Due Money

The Claims Court has exclusive jurisdiction over Tucker Act claims for monetary relief in excess of $10,000. As we have demonstrated and as the court of appeals held, the Claims Court therefore had exclusive jurisdiction over at least part of this case. The court of appeals, however, held that the exclusive jurisdiction of the Claims Court extends *only* to the claim for monetary relief. According to the court of appeals, a "mixed" case involving both a claim for past-due money and a claim for prospective relief can be bifurcated, with the district court and the regional court of appeals deciding the claim for prospective relief, and the Claims Court and the Federal Circuit deciding the claim for money damages.

In contrast, other courts have concluded that the Claims Court has exclusive jurisdiction over any case that *includes* a Tucker Act claim.[29] Under this interpretation, claim

[29] In contexts similar to this one, see *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 359-360 (5th Cir. 1987), petition for cert. pending, No. 87-372; *New Mexico* v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Portsmouth Redevel. & Hous. Auth.* v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983). In the context of actions by military or civilian employees seeking reinstatement and backpay, see *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220, 223 (11th Cir. 1982); *Denton* v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

There is also contrary authority in each context. In contexts similar to this one, see *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852 (8th Cir. 1983); *Rowe* v. *United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981). In the reinstatement-and-backpay context, see *Chabal* v. *Reagan*, 822 F.2d 349, 354 (3d Cir. 1987) (and other Third Circuit cases cited therein); *Shaw* v. *Gwatney*, 795 F.2d 1351, 1356-1357 (8th Cir. 1986) (and other Eighth Circuit cases); and *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981). Although the Court of Claims endorsed claim splitting in the *Smith* case, its successor court more recently observed in a similar reinstatement-and-backpay case that "[n]either the law nor practical purpose" justified "bifurcating [the plaintiff's] money and equitable claims between the Claims Court and the

splitting is prohibited.[30] If the plaintiff asserts only non-Tucker Act claims, or expressly waives any accrued Tucker Act claim, then the district court has jurisdiction. But if the complaint, fairly construed, includes a Tucker Act claim for monetary relief against the United States, and there is no other applicable waiver of sovereign immunity that would permit the action to proceed in district court, then the Claims Court has exclusive jurisdiction over the entire action. We submit that the latter view is the correct one.[31]

Congress could not have intended to allow plaintiffs to preempt the Claims Court from deciding the legal merits underlying Tucker Act claims by merely filing an initial action

district court, respectively." *Oliveira* v. *United States*, 827 F.2d 735, 737 (Fed. Cir. 1987). Thus, although the Third and Eighth Circuits appear to have come down firmly in favor of claim splitting, the position of the Federal Circuit is less clear.

[30] Our discussion in the text is, of course, confined to cases in which the claims for prospective relief depend on the same legal theories that underlie the Tucker Act claim for money. Claim splitting is sometimes unavoidable when a Tucker Act plaintiff raises additional issues on the merits that form no part of his Tucker Act case. For example, a plaintiff who seeks relief under both the Tucker Act and the Federal Tort Claims Act must (unless his Tucker Act claim is for $10,000 or less) litigate in both the Claims Court and the district court. Cf. *United States* v. *Hohri*, *supra*.

[31] As should be clear from the text, we do not agree with either the "primary purpose" test that some courts have applied or the "significant prospective effect" test applied below (see Pet. 12-13 & n.7, 15 n.9; Pet. App. 6a n.1). The "primary purpose" test requires the same kind of "psychological inquiry" that was condemned—we think rightly—in *Ramirez de Arellano* v. *Weinberger*, 724 F.2d 143, 154 n.15 (1983) (Scalia, J.), rev'd en banc, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985). The "significant prospective effect" test would, as Judge Coffin observed (*Departmental Grant Appeals Bd.*, 815 F.2d at 789 (concurring opinion)), permit claim splitting in all but the very rare case, thus interfering to the maximum possible extent with the Claims Court's congressionally assigned role of determining the merits of disputed issues in money cases. In place of these two rules that have been employed by the courts of appeals, we submit that there should be a simple rule that forbids claim splitting when, as in this case, all of the legal issues that the district court would resolve (if claim splitting were allowed) are legal issues that the Claims Court would necessarily resolve in adjudicating the money claim.

in a district court on the basis of some "prospective" effect of the governmental decision at issue. There is neither a textual nor a historical basis for allowing claim splitting, and in the absence of any such affirmative endorsement by Congress it should be prohibited. Moreover, the APA – far from affirmatively endorsing claim splitting – prohibits it by limiting its waiver of sovereign immunity to those situations in which there is no other adequate remedy in a court and no other statute expressly or impliedly forbids the relief sought.

A. Congress Could Not Have Intended to Allow Easy Evasions of Its Conscious Effort to Centralize Tucker Act Cases in the Claims Court and the Federal Circuit

In the Tucker Act and the Federal Courts Improvement Act, Congress has decreed that the Claims Court – and on appeal the Federal Circuit – shall have exclusive jurisdiction of claims in excess of $10,000 against the United States. See note 9, *supra;* pp. 14-15, *supra.*[32] The purpose of these Acts clearly was to centralize all large monetary claims against the United States – claims that before the enactment of the Tucker Act and its predecessors would have been considered by Congress itself – in a single trial court and a single appellate court. See *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 7 (recognizing that purpose of Federal Courts Improvement Act is to ensure uniformity of results in nontort actions against the United States); cf. *United States* v. *Fausto*, slip op. 9, 11-12 (recognizing congressional purpose to ensure consistency of interpretation by centralizing civil service cases in Federal Circuit); *id.* at 11 (noting that Tucker Act cases are similarly centralized). See generally *Glidden Co.* v. *Zdanok*, 370 U.S. at 552-558 (discussing historical role of Court of Claims to provide relief as substitute for private relief bills passed by Congress);

[32] Of course, there are statutes – not at issue here – in which Congress has permitted *specified* monetary claims against the federal government to be pursued in district courts rather than in the Claims Court. See, *e.g.*, 42 U.S.C. 405(g); 42 U.S.C. (& Supp. III) 1395*oo*(f); 42 U.S.C. 2000e-16. No such specific waiver of sovereign immunity is involved in this case.

id. at 566 (noting "lively attention" given by Congress to work of Court of Claims).

The claim splitting sanctioned by the court of appeals threatens to undermine this legislative objective. As the court of appeals construed the Tucker Act, any time a plaintiff appends a claim for prospective relief to a Tucker Act claim for monetary damages, the case must be bifurcated, with the district court and the regional court of appeals resolving any and all legal issues common to both claims for relief. This resolution of all common legal issues, according to the court of appeals, is then binding on the Claims Court by operation of collateral estoppel.[33] Rather than preserving the role of the Claims Court as the single tribunal charged with the uniform resolution of all legal issues presented in such cases, this construction promises to disperse legal actions against the United States for money across every district court in the land and twelve different regional judicial circuits. As the Fifth Circuit has observed, "asking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress – to centralize money claims against the government, except those claims under $10,000 and those sounding in

[33] The court appears to have misunderstood the usual rules of preclusion, which are generally designed to *prohibit* claim splitting. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.405[3], at 192 n.2 (2d ed. 1984) ("The principle that a plaintiff may not assert grounds for recovery that he could have asserted in a prior suit resolved by final judgment derives from the rule against splitting a single cause of action."); see also *id.* ¶ 0.410[1]; *Alyeska Pipeline Service Co.* v. *United States*, 688 F.2d 765 (Ct. Cl. 1982), cert. denied, 461 U.S. 943 (1983); *Boruski* v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 808 (1974). If respondent had brought only its prospective claims in district court, forgoing its Tucker Act claims, the district court might well have had jurisdiction (see note 11, *supra*), but ordinary principles of res judicata would have precluded respondent from maintaining a separate action for money damages at all, let alone maintaining an action in which the government would be collaterally estopped from contesting liability. Here, of course – as both we and respondent have previously emphasized (Pet. 23 n.17; 87-929 Cross-Pet. 7) – it is the court of appeals, not respondent, that has split the claims.

tort, in the Claims Court" (*Amoco Prod. Co.*, 815 F.2d at 367; accord *Portsmouth Redevel.*, 706 F.2d at 474).[34]

Ironically, under the approach taken by the court of appeals, a plaintiff who improperly brings a Tucker Act claim for more than $10,000 in district court may obtain an adjudication of the merits of his claim, and review in the regional court of appeals, so long as he also requests "prospective" relief. But cf. *United States* v. *Fausto*, slip op. 11 ("a Tucker Act action is appealable to the Federal Circuit, regardless of whether it is brought in the Claims Court or the district court"). But a plaintiff who properly brings a Little Tucker Act action in district court must pursue or defend any appeal in the United States Court of Appeals for the Federal Circuit, whether or not he also requests prospective relief. That is because, under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive jurisdiction over any final decision of a district court "if the jurisdiction of that court was based, *in*

[34] In this case in particular, "prospective" relief is not so much a legitimate need of the plaintiff as it is an excuse for the district court and court of appeals to decide the merits of the legal issues underlying the money claims, over which they lack jurisdiction. Under our system of law, all judicial and administrative decisions stand as precedents for later cases. All decisions, therefore, have some potential future effect, even if the controversy they actually resolve pertains entirely to past events. The controversy resolved at the administrative level in this case pertained to Medicaid funding for the years 1978-1982, and the *only* future effect of the GAB decisions is that they stand as precedents. See Pet. App. 4a (administrative disallowance decisions, which necessarily concern money past due, are precedents used "to implement important policies concerning ongoing programs"). A Claims Court decision awarding respondent money on the ground that the GAB was wrong, or a decision denying respondent such an award on the ground that the GAB was right, would have a precedential effect precisely parallel to that of the administrative decisions. Yet the court of appeals deprived the Claims Court of any opportunity to decide that question by maintaining that the precedential effect of the GAB decisions justifies an assertion of jurisdiction by a federal district court and that the district court's decision, as affirmed by the court of appeals, would collaterally estop the losing party from relitigating the merits before the Claims Court.

whole or in part," on the Little Tucker Act (emphasis added). Cf. *United States* v. *Hohri, supra.* It is exceedingly difficult to believe that Congress, whose very strong desire to centralize the adjudication of Tucker Act claims has been recognized by this Court (*Hohri*, slip op. 6-8 & n.4), intended that this purpose could be so easily bypassed in Big Tucker Act cases through the device of claim splitting.[35]

Claim splitting not only undermines the central role of the Claims Court, it generates delay, duplication of effort, confusion, and conflict. Under the rationale of the court of appeals, if the plaintiff proceeds in the district court and prevails, then a second action must be brought in the Claims Court. As a result, every lawsuit against the United States that involves claims to both prospective and retrospective relief has the potential of multiplying into two lawsuits. This inevitably creates additional delay and waste of resources, both judicial and otherwise.[36] Furthermore, if the district court and/or regional court of appeals decide all common issues in the case, and if collateral estoppel is applied in the way the court of appeals assumed it would be, additional problems would arise in applying those

[35] Indeed, the judgment below, by allowing the jurisdiction of the Claims Court to be defeated by artful pleading in any case involving an ongoing or potentially repetitious dispute, threatens to reduce the Claims Court to the role of a mere paymaster. This Court has previously rejected attempts to defeat the sovereign immunity of the United States by the subterfuge that a " 'judicial ascertainment' of credits" is somehow different from a "judgment" against the United States. *United States* v. *Shaw*, 309 U.S. 495, 504 (1940). It should do so here as well, by construing the Tucker Act to mean that the exclusive jurisdiction of the Claims Court extends to any case that *includes* a Tucker Act claim for money damages against the United States.

[36] For example, see *Smith* v. *United States*, 654 F.2d 50 (Ct. Cl. 1981) (refusing to accept district court's transfer of backpay portion of reinstatement-and-backpay case); *Hondros* v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983) (resolving merits of same case in reinstatement context); *id.* at 299 n.40 (views of Chief Judge Seitz) (disagreeing with decision of Court of Claims not to accept jurisdiction); *id.* at 302-303 (Adams, J., concurring) (agreeing with decision of Court of Claims not to accept jurisdiction); *Smith* v. *United States*, 832 F.2d 523 (Fed. Cir. 1987) (14 years after the events in question, and at least 11 years after litigation began, finally resolving the merits of plaintiff's backpay claim for his removal from position as a deputy marshal).

general legal principles to specific claims for monetary relief. In contrast to the usual situation in which a court of appeals decides controlling legal issues and remands to a lower court, which is subject to its review and supervision, here the application of general principles to specific facts is entrusted to the Claims Court, which is subject to review only by the Federal Circuit. Thus the claim-splitting solution endorsed by the court of appeals would create not only delay and duplication of effort, but also a serious potential for intercircuit friction and conflict.

Finally, the judgment of the court of appeals gives rise to new opportunities for forum shopping. Under that court's construction of the Tucker Act, plaintiffs who have Tucker Act claims have the option, in all but the rare case in which the lawsuit focuses exclusively on past, nonrecurring events, of obtaining an adjudication on the merits in either the Claims Court and the Federal Circuit, or a district court and its regional circuit. Thus, if a plaintiff thinks a particular district court or regional court of appeals will be more sympathetic to his claim than the Claims Court, he can file an action for a declaratory judgment in district court, and if successful, use collateral estoppel to convert a favorable judgment into a collection action in the Claims Court. Cf. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (condemning similar attempt to obtain money judgment in state court by first obtaining declaratory judgment in federal court, given state's Eleventh Amendment immunity from award of money damages directly by federal court). Conversely, if a plaintiff thinks the Claims Court will be more sympathetic than a district court, he can go first to the Claims Court, and have the central legal issues resolved there. We submit that no legitimate interest of any party or of the judicial system requires such a result.

In light of all these practical objections to claim splitting, this Court should sanction such a procedure only if faced with the clearest evidence that Congress intended to require it. Yet there is no such positive evidence, clear or otherwise.[37] In fact, as we

[37] There is absolutely no indication that Congress ever intended to permit claim splitting. Indeed, the Judicial Code strongly suggests that Congress regarded it as undesirable. See 28 U.S.C. 1500 ("The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who * * * [was] acting or professing to act * * * under the authority of the United States."). The courts that have permitted claim splitting seem to regard it as a curious side effect of the interaction of the Administrative Procedure Act and the Tucker Act (see Pet. App. 5a-6a), not as a procedure that Congress ever considered and intended.

now show, the limitations of the APA support the view that Congress has actually forbidden claim splitting.

B. The Administrative Procedure Act Does Not Waive Sovereign Immunity for a "Prospective" Action Because the Tucker Act Provides an "Adequate Remedy in a Court"

Respondent's effort to obtain resolution of its "prospective" claims in district court, like its effort to obtain resolution of its monetary claims in district court, is barred by 5 U.S.C. 704. Courts have often recognized that resolution of a Tucker Act suit in the Claims Court can be an "adequate remedy" that precludes APA review.[38] This is so even though APA review, if allowed, might afford forms of relief that are unavailable in the Claims Court. The legislative history of the 1976 amendments to the APA, although it came long after the enactment of Section 704, supports the view that the availability of a Tucker Act remedy had previously been and should continue to be recognized as a basis for denial of relief under the APA.[39]

[38] *American Science & Eng'g, Inc.* v. *Califano*, 571 F.2d 58, 62-63 & n.6 (1st Cir. 1978); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976); *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 580-581 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976); *Warner* v. *Cox*, 487 F.2d 1301, 1304, 1306 (5th Cir. 1974). Results similar to the results in these cases have been reached, without relying on Section 704, in *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986), and *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985). In those cases, the courts have treated the Tucker Act as a statute that "impliedly forbids" an APA action within the meaning of Section 702(2), rather than a statute that provides an "adequate remedy" within the meaning of Section 704.

[39] In addition to the views expressed in note 23, *supra*, Professor Cramton's memorandum submitted at the 1970 hearing supports the position that the adequacy of a Tucker Act remedy is a basis for dismissal of an action purporting to be brought under the APA. See *1970 Hearing* 132.

At least in the circumstances of this case, respondent's Tucker Act remedy would be fully adequate. First, this is simply a dispute about a stream of money payments over time.[40] In such a case, final resolution of the legal dispute by the Claims Court will accomplish all of the plaintiff's litigation objectives: if the plaintiff prevails, it gets back all of the past-due money to which it is entitled, and it obtains a statement of the law that will bind the federal government in its future dealings with the plaintiff. See generally *Amoco*, 815 F.2d at 367; *Cook* v. *Arentzen*, 582 F.2d at 878 n.6. Second, although the Claims Court generally lacks the power to grant declaratory and injunctive relief as such, Congress has explicitly given it the power "to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Thus, in any case (such as this one) involving review of agency action there is little basis for any fear that a plaintiff forced to litigate its entire case in the Claims Court will ever receive less than adequate relief.

In short, under the Tucker Act respondent could have brought its action in the Claims Court. Because this action was "an adequate remedy in a court," nonstatutory review under the APA was precluded by 5 U.S.C. 704, and the only applicable waiver of sovereign immunity was that provided by the Tucker Act. The Claims Court therefore had exclusive jurisdiction over the entire controversy.

C. The Administrative Procedure Act Does Not Waive Sovereign Immunity for a "Prospective" Action Because the Tucker Act "Impliedly Forbids the Relief Which Is Sought"

Even if it were determined that a Tucker Act action in the Claims Court would somehow offer respondent less than "ade-

[40] Cf. *Warner* v. *Cox*, 487 F.2d at 1304 (in holding that plaintiff's exclusive remedy for alleged nonpayment of money due under an ongoing contract with the federal government was an action under the Tucker Act, the court observed that "[n]one of the substantive claims presented to the court below concerned anything but the payment of money – when, how much, and by whom it should be paid").

quate" relief, it still would not follow that respondent had the right to supplement its Tucker Act remedies with an action under the APA in the district court. In addition to the limitations on nonstatutory review contained in Section 704, 5 U.S.C. (Supp. IV) 702(2) forbids APA courts to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The Tucker Act is certainly a statute that may – by denying the Claims Court the ability to award a particular remedy – "impliedly forbid[]" such relief under the APA. See *Sharp* v. *Weinberger*, 798 F.2d at 1523-1524; *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891, 892-893 (D.C. Cir. 1985); *Ramirez de Arellano* v. *Weinberger*, 745 F.2d at 1553 (Scalia, J., dissenting); *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985); see also Cramton, *supra*, 68 Mich. L. Rev. at 433-436. If Congress has denied the Claims Court the power to render certain kinds of judgments in cases involving money disputes, that is a legislative judgment deserving the courts' respect, not a defect for courts to remedy by permitting an action under the APA to afford more complete or perfect relief. But see, *e.g.*, *Rowe* v. *United States*, 633 F.2d at 802 (treating limited equitable powers of the Court of Claims as a justification for claim splitting).

In the present case, the remedial powers of the Claims Court, when and if this case comes before it, will be limited to the power to render a money judgment and the limited power of remand to the agency that is given by 28 U.S.C. 1491(a)(2). The court will not have the power to issue a declaratory judgment that the GAB has misconstrued the law, or to enjoin petitioners henceforth to construe the law differently when dealing with respondent.[41] See generally *Richardson* v. *Morris*, 409 U.S. 464,

[41] Petitioners and their successors in office would, however, presumably be bound by collateral estoppel from relitigating against respondent any disputed issues of law or fact actually decided by the Claims Court and not reversed, modified, or rendered irrelevant by subsequent review. Compare *Montana* v. *United States*, 440 U.S. 147 (1979) (collateral estoppel available against United States in favor of one who was a party to a prior proceeding), and *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984) (collateral estoppel against

465 (1973); *United States* v. *King*, 395 U.S. 1, 4-5 (1969). But even indulging in the dubious premise that such orders have any meaning to respondent—other than as a hook from which to hang a jurisdictional cloak—the proper conclusion to draw would be that they are forms of relief impliedly forbidden by the Tucker Act, not forms of relief that *must* be available in district court because they are not available under the Tucker Act.

In sum, the APA is a statute designed to provide remedies in cases that the Tucker Act does not touch, and the 1976 amendments to the APA were never intended to create a scheme to circumvent or supplement the Tucker Act and its limitations. Respondent's proper remedy, if respondent has a valid complaint under the Medicaid statute and does not wish to waive its accrued monetary claims, lies entirely in the Claims Court under the Tucker Act, not in the district court. The complaints were filed in the wrong court, and the judgments of the court of appeals, to the extent that they validate that court's exercise of jurisdiction, should be reversed.

United States extends to issues of law as well as issues of fact), with *United States* v. *Mendoza*, 464 U.S. 154 (1984) (collateral estopel not available against United States in favor of one who was not a party to a prior proceeding).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with directions to vacate the judgments of the district court in their entirety and transfer the cases to the Claims Court pursuant to 28 U.S.C. 1631.

Respectfully submitted.

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